

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-010709

11/26/2019

HON. PAMELA GATES

CLERK OF THE COURT

S. Ortega

Deputy

M & M WRIGHT L L C

MARIO VASTA

v.

BRUCON L L C, et al.

JOHN C MARCOLINI

GEORGE J COLEMAN III
DOCKET-CIVIL-CCC

MINUTE ENTRY

The court considered Chalmers & Kendall's Motion to Dismiss for Lack of Personal Jurisdiction and on Forum Non-Conveniens Grounds ("Motion"), M&M Wright, LLC's Response to Motion to Dismiss for Lack of Personal Jurisdiction and on Forum Non-Conveniens Grounds ("Response"), Chalmers & Kendall's Reply, and the parties' arguments.

"To survive a motion to dismiss for lack of personal jurisdiction, the plaintiff must offer "facts establishing a *prima facie* showing of jurisdiction." *Beverage v. Pullman & Comley LLC*, 232 Ariz. 414, 417 ¶10 (App. 2013)(quotation marks and citation omitted)(order affirmed as modified in *Beverage v. Pullman & Comley LLC*, 234 Ariz. 1 (2014)). If the plaintiff is successful, the burden then shifts to the defendant to rebut the showing. *Id.* (citing *Arizona Title, LLC v. Berger*, 223 Ariz. 491, 493 ¶ 8 (App. 2010).

In analyzing the facts in this case, the court construed the allegations in the light most favorable to M&M Wright, drawing the most favorable inferences for the existence of jurisdiction, and resolving conflicts in the affidavits in the favor of M&M Wright. *See Planning Grp. of Scottsdale, LLC v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, 264 n.1 ¶2 (2011)(in reviewing a motion to dismiss for lack of personal jurisdiction, the trial court views "the facts in

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the light most favorable to the plaintiffs but accepts [] as true the un-contradicted facts put forward by the defendants.”); *Macpherson v. Taglione*, 158 Ariz. 309, 312 (App. 1988)(“Those conflicts that exist in the affidavits and pleadings must be resolved in the plaintiff’s favor for purposes of determining whether a *prima facie* case for *in personam* jurisdiction has been established)(internal markings and citation omitted). Based on that standard, the court makes the following findings:

- In early 2017, Arizona resident Mark Wright (“Wright”) began negotiations with Brucon LLC (“Brucon”), through its principal, Gregory Brunetti (“Brunetti”), to purchase an Arizona company called the AAE Myers Group (“the Arizona Company”). *See* Response at Exhibit A, Wright Declaration at ¶ 2.¹
- The Arizona Company is a supplier of metal roofing and structural metal decking materials to customers in Arizona. *Id.* at ¶ 3.
- Brucon purchased the Arizona Company in December 2016, shortly before trying to resell it. *Id.* ¶ 4. In connection with the resell efforts, Brucon used an Arizona brokerage company, WCI Business Brokers (“WCI”), and specifically a broker named Dennis Hayes to broker the sale. *Id.* ¶ 5.
- On February 17, 2017, Wright and Brucon entered into a Business Assets Purchase Agreement (“the Agreement”) under which Wright was to purchase the Arizona Company for \$1,125,000.00. *Id.* at ¶ 6 & Exhibit A(1). The Agreement made the sale contingent on Wright’s examination of the business’ books and records. *See* Motion at Exhibit B ¶ 3. The due diligence contingency gave Wright five days to provide Brucon with a written list of all business records he wished to examine and fourteen days after receipt of those records to conduct his examination. *Id.* ¶ 3. Dennis Hayes avowed and Wright did not dispute that Wright informed Dennis Hayes that prior to the due diligence contingency period expiring on March 7, 2017, Wright had the financial information of the Arizona Company reviewed by Wright’s own accountant. *Id.* ¶ 4 & 5; *see also* Response at Exhibit A, Wright Declaration at ¶ 8 (stating that between February and May 2017, Wright inspected various types of financial documents related to the Arizona Company). The closing date was scheduled for April 18, 2017 and was subsequently amended to May 17, 2017. *See* Response at Exhibit A, Wright Declaration at ¶ 7.
- Brucon represented to Wright that this was a “confidential sale,” meaning Wright was not permitted to speak with employees or examine the Arizona Company’s records directly from the Arizona Company’s system. *See* Response at Exhibit A, Wright Declaration at ¶ 9. Instead, as noted above, Wright was only permitted to ask for documents, which were to be provided by Brucon and Brunetti. *Id.*

¹ In resolving jurisdictional fact issues, the court may consider affidavits and exhibits without converting the motion to dismiss into one for summary judgment. *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991).

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- In early March, Brucon provided Wright a Profit & Loss Statement for January through February, 2017 (the “Feb 2017 P&L”), showing \$122,379.55 in net income. *Id.* at ¶ 10 & Exhibit A(2).
- In early April, Brucon provided Wright a Profit & Loss Statement for January through March, 2017 (“the “March 2017 P&L”), showing \$192,680.00 in net income. *Id.* & Exhibit A(3).
- Based on this data, Wright avowed that he believed that the Arizona Company was performing consistently with its historic profits. *See* Response at Exhibit A, Wright Declaration at ¶ 11.
- Wright needed financing to purchase the Arizona Company. *See* Response at Exhibit A, Wright Declaration at ¶ 12. Wright worked with Pinnacle Bank (“Pinnacle”) to acquire a Small Business Administration (“SBA”) loan for part of the purchase price. *Id.* As part of the loan approval process, Pinnacle required Wright to project the Arizona Company’s profits and losses for the upcoming 24 months. *Id.*
- According to Wright, he believed more detailed financial data was required to project profits and losses accurately into the future than Wright had available to him. *Id.* ¶ 13.
- On May 3, 2017, Wright informed Arizona broker Dennis Hayes with WCI via email that he could not complete the request from Pinnacle Bank regarding projections for expenses and net income. *See* Motion at Exhibit B Tab 1.
- Dennis Hayes responded that he thought Wright’s accountant “could make short work of [the requested task] from prior P&L’s.” *See* Motion at Exhibit B Tab 1. As a backup alternative, Dennis Hayes indicated that he could ask his brother “to take old P&L’s and fill in this projection sheet.” *See* Motion at Exhibit B Tab 1. Dennis Hayes informed Wright that Wright would have to pay him “but it wouldn’t be much and he’d make you look good.” *See* Motion at Exhibit B Tab 1.
- Wright requested that Dennis Hayes check with his brother and stated “I just need a VERY conservative stable projection.” *See* Motion at Exhibit B Tab 1. Wright asked Dennis Hayes to “[l]et me know if he could do it, [and] how much?” *See* Motion at Exhibit B Tab 1.
- Dennis Hayes avowed that based on his belief that Wright already decided to buy the Arizona Company and that Pinnacle Bank likely already decided to approve the loan based on the appraisal, Dennis Hayes offered to contact his brother, Stephen Hayes, to help Wright. *See* Motion at Exhibit B ¶ 9-10 and Tab 1.
- Stephen Hayes is the sole shareholder of Chalmers & Kendall, CPAs, PLLC (“C&K”), a Michigan professional limited liability company. C&K’s only office is located in Michigan. *See* Motion at Exhibit A ¶¶ 1-2. Stephen Hayes is a CPA licensed only in Michigan. *See* Motion at Exhibit A ¶¶ 1-2. Stephen Hayes is referred to herein as “Stephen Hayes” or “the Michigan accountant.”

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- According to Dennis Hayes, when he contacted the Michigan accountant, he informed the Michigan accountant that he was working on a sale of an Arizona business. *See* Motion at Exhibit B ¶ 13. Dennis Hayes asked the Michigan accountant if he could annualize on a spreadsheet the first quarter 2017 numbers using the numbers provided by the seller and using the assumptions provided to the Michigan accountant by Dennis Hayes. *See* Motion at Exhibit B ¶ 13. Dennis Hayes told the Michigan accountant that “while the Arizona business sale . . . was set to close, the SBA lender needed to complete this as one of the last items for its punch-list.” *See* Motion at Exhibit B ¶ 13. The Michigan accountant advised Dennis Hayes that he would run the spreadsheet, but that his accounting firm would not issue any type of formal forecast or projection on firm letterhead. *See* Motion at Exhibit B ¶ 13. Dennis Hayes avowed that he advised the Michigan accountant that the request was a simple exercise of “inputting supplied numbers and rolling them forward on an Excel spreadsheet.” *See* Motion at Exhibit B ¶ 13.
- Stephen Hayes has never previously prepared formal income and loss projections or forecasts due to the expense involved in the preparing the projections and the associated litigation risks. *See* Motion Exhibit A ¶ 3.
- The Michigan accountant was aware that the lender was going to use the spreadsheet to complete its SBA checklist for the loan.” *See* Motion at Exhibit A ¶ 14 and Exhibit B ¶ 22. The Michigan accountant avowed that he never thought the buyer was going to “use, much less ‘rely,’ on the spreadsheet, especially since it was not on C&K letterhead . . .” *See* Motion at Exhibit A ¶ 14.
- Dennis Hayes indicated that he believed, based on his interactions with Wright, that Wright decided to buy the Arizona Company prior to requesting the spreadsheet of annualized numbers from the Michigan accountant. *See* Motion at Exhibit B ¶ 22 (listing the activities of Wright Dennis Hayes relied on in forming his opinion that Wright decided to buy the Arizona Company before receiving the spreadsheet of annualized expenses).
- The Michigan accountant was told that either Dennis Hayes or the Arizona buyer would pay the Michigan accountant for his time. *See* Motion at Exhibit A ¶ 12.
- Wright believed that a professional accountant with access to the Arizona Company’s data would be able to create accurate projection. *See* Response at Exhibit A ¶ 14.
- In connection with the request that the Michigan accountant perform the work, Wright was copied on an email between the Michigan accountant and Dennis Hayes in which Dennis Hayes instructed the Michigan accountant to:
 - Show \$3K/mo. for rent (moving to a new space shortly)
 - Add a \$3K/mo. for a new employee starting in May/17
 - Add \$7500 in June/27 and \$7500 in July/17 for improvements to the newly leased space
 - Reduce fuel costs by \$500/mo. due to new location. *See* Motion at Exhibit A ¶ 7 and Tab 3.

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- Dennis Hayes avowed and Wright did not dispute that the adjustments in the email from Dennis Hayes to the Michigan accountant were “at . . . Wright’s instruction[].” *See* Motion at Exhibit B ¶ 16.
- The Michigan accountant never emailed Wright nor talked to Wright. *See* Motion at Exhibit A and Tab 4. The Michigan accountant never emailed Pinnacle Bank directly nor spoke with anyone at Pinnacle Bank.
- When the Michigan accountant ultimately transmitted the spreadsheet, he emailed it to Dennis Hayes. *See* Motion at Exhibit A Tab 5.
- A review of the spreadsheet reveals that the document simply annualizes the data from the March 2017 P&L Statement and includes the assumptions as instructed in the email. The spreadsheet was not on C&K’s letterhead and included no information to suggest the document was prepared by the Michigan accountant or C&K. *See* Motion at Exhibit B Tab 6. On its face, the document is clearly a spreadsheet with annualized data from the March 2017 P&L Statement and which incorporates the assumptions from the email sent by Dennis Hayes to Wright and the Michigan accountant. *Id.*
- After receiving the spreadsheet from the Michigan accountant, Dennis Hayes transmitted the spreadsheet to Wright and Pinnacle Bank stating, “[a]ttached are the requested projections for 2017 & 18 for M&M Wright LLC dba AAE Myers Group. They were developed from recent sales and results, and were developed with a few assumptions:
 - **2nd, 3rd, 4th qtr 2017 sales mimic the first quarter**
 - One employee is added at \$3K/mo.
 - Rent is raised to \$3K per the new lease
 - \$15K of improvements are installed in the newly leased space in June & July
 - \$500 is saved on fuel due to new location
 - 5% sales growth was baked into 2018” *See* Motion at Exhibit B Tab 8 (emphasis added)
- The Michigan accountant “labeled the spreadsheet as a ‘Net Income Projection’ because it needed a file name . . .” *See* Motion at Exhibit A ¶ 11.
- The Michigan accountant had no meaningful contact with the Arizona Company, Wright, Brucon, or Brunetti. *See* Motion at Exhibit A ¶ 15. The Michigan accountant did not prepare or transmit an engagement letter to Wright or the Arizona Company. *Id.* The Michigan accountant did not travel to Arizona in connection with performing the work. *Id.* C&K did not provide any document to Wright on its letterhead or include any indication on the spreadsheet that the document was prepared by C&K or a certified public accountant.
- The Michigan accountant avowed that he was “never asked [by Dennis Hayes or Wright] to issue formal projections with any opinion about their reliability, or to in any way test or verify the underlying numbers . . . and C&K certainly never agreed to undertake such tasks.” *See* Motion at Exhibit A ¶ 15.

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- The Michigan accountant avowed that formal projections would have involved a formal engagement letter, a trip to Arizona, interviews with the seller and contacting business customers to verify sales. *See* Motion at Exhibit A ¶ 17.
- After sending the spreadsheet to Dennis Hayes, C&K sent an invoice to Dennis Hayes that identified M&M Wright LLC on the invoice. The invoice charged \$285.00 for professional services rendered for “[p]reparation of 2017 and 2018 forecasted income from operations.” *See* Response at Exhibit A(5). The invoice included a “courtesy” discount of \$100.00. *Id.* Wright paid the invoice and C&K deposited the check. *Id.* at Exhibit A(6); *see also* Motion at Exhibit B ¶ 19.
- C&K did not tell Wright he was unable to rely on the projections nor did C&K place any limitations on the usage of the information on the spreadsheet titled “Net Income Projections.”

The Arizona courts apply a three-part test to determine whether the exercise of specific personal jurisdiction comports with due process: (1) the non-resident defendant must purposefully avail itself of the privilege of conducting business in Arizona, thereby invoking its benefits and protections; (2) the plaintiff’s claim must arise out of or relate to the defendant’s contact with Arizona; and (3) the exercise of jurisdiction must be reasonable. *Williams v. Lakeview Co.*, 199 Ariz. 1, 3 ¶ 7 (2000); *Beverage v. Pullman & Comley, LLC*, 232 Ariz. 414, 417 ¶ 9 (App. 2013)(“Arizona may exercise specific jurisdiction over an out-of-state defendant when the aggregate of the defendant’s contacts with this state demonstrate: 1) purposeful conduct by the defendant targeting the forum, rather than accidental or causal contacts or those brought about by the plaintiff’s unilateral acts; 2) a nexus between those contacts and the claim asserted; and 3) that exercise of jurisdiction would be reasonable.”); *Van Heeswyk v. Jabiru Aircraft Pty, Ltd.*, 229 Ariz. 412, 420 ¶ 9 (App. 2012)(noting that the Arizona Supreme Court has adopted a “holistic approach” to personal jurisdiction, in which there is “no mechanical formula” and the facts of each case must be weighed individually to consider all of the contacts between the defendant and the forum state and whether the defendant engaged in purposeful conduct for which it could reasonably be expected to get haled into an Arizona court with respect to that conduct). Once the plaintiff makes a *prima facie* showing of jurisdiction, the burden shifts to the defendant to rebut the showing. *See Beverage*, 232 Ariz. at 417 ¶ 10.

A careful examination of the declarations and attachments reveals that C&K did not purposefully avail itself of the privileges of conducting business in Arizona, thereby invoking its benefits protections.

“The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’” *See Burger King Corp. v. Rudzewics*, 471 U.S. 462, 472 (1985)(citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). “By requiring that individuals have ‘fair warning that

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a particular activity may subject [them] to the jurisdiction of a foreign sovereign . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit.” *Id.* (internal markings and citations omitted). Personal jurisdiction is proper where a defendant purposefully directs his activities at residents of the forum because that purposeful direction gives the defendant “fair warning” that he or she may be subjected to that forum’s jurisdiction. *See Burger King*, 471 U.S. at 472. Admittedly, a single transaction is sufficient to confer jurisdiction on this court; however, the largely clerical conduct in this case is insufficient to establish personal jurisdiction.

When this case is compare to the facts of *Beverage v. Pullman & Comley, LLC*, 232 Ariz. at 417 ¶ 10, the distinction between sufficient and insufficient contacts becomes more apparent. In *Beverage*, the court of appeals found personal jurisdiction over a foreign professional firm, noting that the firm took active steps to secure an Arizona client, sent promotional materials about the law firm to Beverage’s agent in Arizona, affirmatively agreed to represent Beverage, knowing that he lived in Arizona, transmitted a formal engagement letter to the Arizona client offering to provide a formal opinion on a tax shelter, interviewed the Arizona client to learn the background facts, performed extensive legal work researching and preparing the letter and knowing the Arizona client would rely on the opinion letter, and sent a 58 page opinion letter to Arizona along with a \$50,000.00 invoice the Arizona client paid. *Id.* at ¶11; *see also Planning Grp. of Scottsdale, LLC v. Lake Mathews Mineral Props., Ltd.*, 226 Ariz. 262, 264 ¶¶ 4-7 & 29-31 (2011) (finding sufficient contacts “with little difficulty” when the defendant California company sent a solicitation document to the Arizona investor, conducted extensive telephone calls with the Arizona investor, and sent emails, letters, and faxes to the Arizona investor, sent a letter setting out the basic propositions on which a transaction could proceed to which the Arizona investor agreed, and received payments of \$190,000.00 from the Arizona investor).

Here, C&K did not solicit any work from Arizona. C&K expressly refused to provide the deliverable on its letterhead or include any indicia that the spreadsheet was prepared by C&K. *See Beverage*, 232 Ariz. at 418 ¶ 15 (noting that the out-of-state law firm provided representation or services directed toward the forum state). C&K did not provide an engagement letter to the Arizona Company and never talked to Wright or any member of the Arizona Company. C&K did not interview an Arizona resident to verify the information it received, and avowed that it did not believe the Arizona Company would rely on the document. C&K believed it was merely annualizing provided data, populating cells on an Excel spreadsheet, and transmitting the document for use by a bank in evaluating a loan. The invoice C&K sent to Dennis Hayes included time of approximately one hour spent populating the Excel spreadsheet. The work the Michigan accountant performed for Wright was primarily clerical. The court finds that C&K’s contacts with Arizona were not meaningful and did not establish a substantial connection. *See Burger King Corp.*, 471 U.S. at 476 (holding that jurisdiction is not proper unless the defendant’s actions giving

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rise to the litigation create a “substantial connection” with the forum state); *see also Hoag v. French*, 238 Ariz. 118, 120 (App. 2015)(holding that that Arizona lacked personal jurisdiction over a Bahamas-based trust administration company even though the trust’s beneficiary resided in Arizona and the company (1) paid property taxes and insurance on real property owned by the beneficiary in Arizona; (2) paid spousal maintenance to the beneficiary’s former spouse in Arizona; and (3) made distributions to the beneficiary); *Cohen v. Barnard, Vogler & Co.*, 199 Ariz. 16, 18 ¶10 (“[W]hen the only nexus with the forum state is the effect of a damage-causing event, the requisite minimum contacts generally do not exist.”).

Because this analysis ends the court’s assessment of whether Arizona has personal jurisdiction over C&K, the court does not address whether the exercise of jurisdiction over C&K would be reasonable in this case or whether this court should dismiss the claim against C&K under the forum non conveniens doctrine.

IT IS ORDERED granting C&K’s Motion to Dismiss for Lack of Personal Jurisdiction. The court finds there is no just reason for delay and enters this judgment under Rule 54(b) of the Arizona Rules of Civil Procedure.

/ s / PAMELA GATES

JUDGE OF THE SUPERIOR COURT